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No. 94-6

In The

Supreme Court of the United States

October Term, 1994

THE STATE OF TEXAS,

Petitioner,

v.

HON. WALLACE BOWMAN, PRESIDING JUDGE OF THE COUNTY CRIMINAL COURT NUMBER FOUR OF TARRANT COUNTY, TEXAS

Respondent.

Petition For A Writ Of Certiorari To The Court Of Criminal Appeals of Texas

BRIEF IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent respectfully prays that no writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas.

SUMMARY OF THE ARGUMENT

The petition should be refused because the Texas Court of Criminal Appeals' decision did not turn on whether the statute in question, Texas Code of Criminal

Procedure, Article 35.261, was constitutional. Instead the critical issue presented to the Texas Court was whether as a matter of Texas law, a defendant aggrieved by a *Batson*[1] violation could request a remedy outside the remedy provided by the Texas *"Batson"* statute.

The resolution of that issue is a question of state law and does not require intervention by this Court.

ARGUMENT

The issue presented to the Texas Court of Criminal Appeals was whether respondent, a county court level judge, was under a ministerial duty to dismiss the jury array, and call a new array, after he determined the state sought to use its peremptory challenges to exclude potential jurors from service solely on the basis of race. The Texas Court of Criminal Appeals held that, for a number of reasons, he was under no such duty.

Petitioner contends, "the Court of Criminal Appeals has declared that the federal constitution prohibits the Texas legislature from instituting the uniform remedy [for a *Batson* violation] the legislature has chosen." (Petition, p. 7). That is not accurate. The impression given by Petitioner is that the Texas Court of Criminal Appeals declared a state statute unconstitutional. Close analysis of the court's opinion, however, reveals that not to be the case.

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[1] 476 U.S. 79 (1986).

In rejecting petitioner's requested mandamus relief, the Texas Court of Criminal Appeals noted that following the *Batson* violation by the State in this case, the defendant acquiesced to relief *outside* the statute in question. That statute provides for the dismissal of the array and the empaneling of a new array for any defendant requesting that particular relief. In our case, the defendant did not invoke that statute, but instead agreed to relief outside the statute, namely, the empaneling of the minority venire members who were the targets of the improper peremptory challenges. *Curry v. Bowman,* No. 71,606 (petitioner's appendix, A-2, 8).

The issue of whether a defendant is entitled to receive relief outside that provided by a particular state statute does not raise any issue requiring this Court's intervention. Admittedly, the opinion *does* contain language indicating that if the only relief available for a *Batson* violation were the relief provided by Art. 35.261, the statute would be unconstitutional. Not recognized by Petitioner, however, is that the Texas Court of Criminal Appeals held that the particular facts of this case involve a defendant who was *not* requesting relief under Art. 35.261. *Curry v. Bowman,* No. 71,606 (petitioner's appendix, A-2, 8).

The fact that the defendant agreed to relief outside the statute is not surprising since it is clear the statute, which was passed shortly after (and in response to) this Court's decision in *Batson,* is something of a *Batson* dinosaur. For example, the statute, by its very wording, still requires that in order to make a *Batson* objection, the "defendant [be] a member of an identifiable racial group," – a codification of the original requirement in

Batson later specifically overturned in *Powers v. Ohio*, 499 U.S. 400 (1991). *Batson* has evolved. Art. 35.261 has not. Because of the failure of Art. 35.261 to keep up with the changes in *Batson* analysis, many of the dictates of the statute have been emasculated by Texas courts through broad interpretations which, to a large extent, ignore the statute's literal language. For example, in spite of the language in the statute to the contrary, Texas courts do not now require that a defendant be a member of an identifiable racial minority group in order to obtain relief under *Batson*. This case is simply another example of the statute being further weakened by the Texas judiciary. The Texas Court of Criminal Appeals, without holding the statute unconstitutional, ruled that it is permissible under Texas law for a trial judge to fashion a *"Batson"* remedy outside the Texas *"Batson"* statute.

> We now hold that where a *Batson* claim is sustained the court may fashion a remedy in its discretion consistent with *Batson* and its progeny. Therefore, respondent's decision to reinstate the excluded veniremembers to the jury is consistent with our decision today and will not be disturbed. *Curry v. Bowman*, No. 71,606 (petitioner's appendix, A-6-7).

Respondent believes that the question of whether Art. 35.261 should be interpreted as providing the only remedy available under Texas law for a *Batson* violation is an issue of state procedural law which this Court should decline to address.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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